

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

JAMES EMERY,
Petitioner

v.

JAMES McCRADY, *et al.*,
Respondents

:
:
:
:
:
:
:
:

CIVIL NO. 1:12-CV-774

(Judge Caldwell)

M E M O R A N D U M

On April 23, 2012, Petitioner, James Emery, a state inmate at the Retreat State Correctional Institution in Hunlock Creek, Pennsylvania, filed this *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following a guilty plea, Emery was convicted in the Court of Common Pleas of Dauphin County, Pennsylvania, in 2008 for carrying a firearm without a license, possession with intent to deliver, unlawful possession of drug paraphernalia, simple assault and criminal conspiracy. He was sentenced to an aggregate term of sixty-one months to twelve years. In his habeas petition, Emery asserts that he received ineffective assistance of counsel and that his guilty plea was involuntary. (Doc. 1, Habeas Pet.).

On May 16, 2012, this court undertook a preliminary review of the Petition and concluded it was time-barred. We set forth our analysis in a memorandum. See *Emery v. McCrady*, 2012 WL 1721344 (M.D. Pa.). We gave the parties an opportunity to address the timeliness issue. Emery has not filed a brief or other response challenging the court's determination that his habeas petition is time-barred, and the time for doing so has now expired. Respondents filed a Response to the Habeas Petition on July 2, 2012, asserting the petition is time-barred. (Doc. 10). For the reasons set forth in the May 16

memorandum, the habeas petition will be dismissed as untimely.¹

We must decide whether to grant a certificate of appealability. Under 28 U.S.C. § 2253(c)(2), a “certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.” For the reasons stated in the May 16 memorandum, Emery has not made such a showing. Therefore, a certificate of appealability will not issue. However, Emery is advised that he has the right for thirty (30) days to appeal our Order denying his § 2254 motion, see 28 U.S.C. § 2253(a) and Fed. R. App. P. 4(a)(1)(A), and that our denial of a certificate of appealability does not prevent him from doing so, as long as he also seeks, and obtains, a certificate of appealability from the court of appeals. See Fed. R. App. P. 22.

We will issue an appropriate order.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: November 26, 2012

¹ We update some of the background in that memorandum. In that memorandum, we noted that Petitioner’s second PCRA petition appeared to be untimely filed. 2012 WL 1721344 at *3. Respondents’ recent filing (Doc. 12) confirms that the second PCRA was indeed untimely.

We also update some procedural history. Petitioner’s petition to the Pennsylvania Supreme Court, filed on April 23, 2012, to allow a nunc pro tunc appeal of the denial of his first PCRA petition was denied on February 2, 2012.

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

JAMES EMERY,
Petitioner

v.

JAMES McCRADY, *et al.*,
Respondents

:
:
:
:
:
:
:
:

CIVIL NO. 1:12-CV-774

(Judge Caldwell)

ORDER

AND NOW, this 26th day of November, 2012, for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The petition for a writ of habeas corpus (Doc. 1) under 28 U.S.C. § 2254 is DENIED as time-barred.
2. A certificate of appealability is denied.
3. The Clerk of Court shall close this file.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge